Supreme Court, U.S.
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No. 10-596

In The

Supreme Court of the United States

FAYE COFFIELD, et al.,

Petitioners,

v.

BRIAN KEMP, in his Official Capacity as Georgia Secretary of State and Chairperson of the Georgia State Election Board,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRITT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit erred in declining to rule that Georgia's 5% petitioning requirement for non-major party candidates for the United States House of Representatives is unconstitutionally burdensome, given that no such candidate has met the requirement since 1964 and no minor party candidate has ever met it.

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OPINIONS BELOW

The decision of the court of appeals is reported at 599 F.3d 1276 and is reproduced in the Appendix at 1-3. The decision of the district court is not reported and is reproduced in the Appendix at 6-8.

JURISDICTION

The decision and judgment of the court of appeals were entered on March 19, 2010. An order denying petitioners' timely petitions for rehearing and for rehearing en banc was entered on August 4, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Ga. Code Ann. § 21-2-170(b)

> A nomination petition of a candidate seeking an office which is voted upon state wide shall be signed by a number of voters equal to 1 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. A nomination petition of a candidate for any other office shall be signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is

seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. However, in the case of a candidate seeking an office for which there has never been an election or seeking an office in a newly constituted constituency, the percentage figure shall be computed on the total number of registered voters in the constituency who would have been qualified to vote for such office had the election been held at the last general election and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected.

STATEMENT

This case questions the continuing validity of *Jenness v. Fortson*, 403 U.S. 431 (1971), in which this Court upheld a Georgia ballot access requirement that a non-major party candidate for public office submit a nomination petition containing signatures equal to five percent of the number of voters qualified to vote for the office in the preceding election (the "5%" requirement).

Petitioner Coffield sought access to the ballot for the November 4, 2008 general election as an independent candidate for the United States House of Representatives from Georgia's fourth congressional district. District Court Document No. ("Doc") 14, Att 1, ¶ 1. The petitioners and others began circulating Coffield's nomination petition in April, 2008. *Id.*, ¶ 2.

On or about July 5, 2008 they tendered some 2,000 signatures to the respondent's representatives, who refused to accept them on the ground that the petition contained fewer signatures than " . . . 5 percent of the total number of registered voters eligible to vote in the last election for the filiing of the office the candidate is seeking. . . ." *Id.*, ¶¶ 4, 5; Ga. Code Ann. § 21-2-170(b). Coffield was denied access to the November 2008 ballot. On August 29, 2008, petitioners filed an action in the district court pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief. Doc 1. Federal jurisdiction was predicated on 28 U.S.C. §§ 1331 and 1343.

For 2008 the 5% requirement was 15,061 signatures in Georgia's fourth congressional district. *Id.*, ¶ 6.[1] Petitioners presented the courts below with historical and comparative data, unavailable to this Court in *Jenness v. Fortson, supra*, showing that no independent candidate for the United States House of Representatives had met the 5% requirement since 1964, *id.*, ¶ 13; that no minor party candidate for the United States House of Representatives had ever met the 5% requirement, *id.*, ¶ 14; that no independent candidate for the United States House of Representatives in any state had ever met a petition requirement

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[1] In the November 2010 election the number of petition signatures required to obtain access to the ballot for an independent candidate for the United States House of Representatives from Georgia's fourth congressional district was 18,032. *Id.*, ¶ 8.

greater than 12,919 signatures, *id.*, ¶ 8; that Georgia is one of only two states which require an independent candidate for the United States House of Representatives to obtain signatures exceeding three percent of the registered voters in the district in question, *id.*, ¶¶ 11, 12; that in 2008 the nationwide median signature requirement for independent candidates for the United States House of Representatives was 2,750, and that the requirement was less than 5,000 in 318 congressional districts, between 5,000 and 9,999 in 62 districts, and 10,000 or more in only 55 districts, including all of Georgia's districts, *id.*, ¶ 15.

Notwithstanding this empirical data, the district court ruled that the petitioners were foreclosed by *Jenness* and additionally cited *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002) (also upholding the 5% requirement) and *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007) (upholding Alabama's 3% requirement). Doc 30 at 1-2. The court of appeals affirmed the district court, also citing *Jenness*, *Cartwright* and *Swanson*.

REASONS FOR GRANTING THE PETITION

In *Jenness*, this Court stated that "Georgia's election laws . . . do not operate to freeze the political status quo. In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution." *Jenness* at 438. However, subsequent

experience has shown that the 5% requirement is too difficult a burden for candidates to overcome with any regularity.

The decisions of the courts below are inconsistent with relevant decisions of this Court since *Jenness*. The court of appeals' opinion provides in its entirety as follows:

> Appellant-Plaintiff Coffield sought access to the 2008 general election ballot as an independent candidate to represent Georgia's Fourth Congressional District in the United States House of Representatives. She was not on the ballot. Briefly stated, she was unable to collect a sufficient number of signatures to satisfy Georgia's requirement that an independent candidate submit a nomination petition signed by at least 5% of the total number of registered voters eligible to vote in the last election for the position the candidate seeks. Ga. Code Ann. § 21-2-170. This appeal presents one issue: whether the district court erred when it dismissed Coffield's constitutional challenge for failure to state a claim under Rule 12(b)(6). We conclude it did not.
>
> Coffield claims that Georgia's 5% rule is too burdensome; she alleges no independent candidate for the House of Representatives in Georgia has met the requirement since 1964 and that no minor party candidate has ever met it. *But she does not allege how many candidates have tried.* According to the Complaint, Coffield's own petitioning effort resulted in about 2000 signatures, less than 1% of the eligible pool and about 13,000 signatures short of what the rule required.

> *Our Court and the Supreme Court have upheld Georgia's 5% rule before. See Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 1974-76 (1971) (stressing lack of restrictions on write-in candidates and on the obtaining of signatures for nominating petitions); *Cartwright v. Barnes*, 304 F.3d 1138, 1140-42 (11th Cir. 2002); *see also Swanson v. Worley*, 490 F.3d 894, 910 (11th Cir. 2007) (upholding Alabama's 3% requirement where no independent or minor party candidate had obtained ballot access when nothing indicated that similar potential candidates had sought ballot access). *The pertinent laws of Georgia have not changed materially since the decisions in Jenness and Cartwright were made.*
>
> AFFIRMED.

(Emphasis added.)

Thus, the Eleventh Circuit's decision was grounded in three considerations: First, Coffield did not allege how many candidates have tried to meet the 5% requirement. Second, the Eleventh Circuit and this Court have previously upheld the 5% requirement. Third, the pertinent laws have not changed materially since the Eleventh Circuit and this Court upheld the 5% requirement.

None of these considerations support the Eleventh Circuit's decision. First, it was impossible for Coffield to have alleged how many candidates have tried to meet the 5% requirement. There is no registry of candidates who have tried to meet the requirement and failed. Such candidates need not report their

attempts or their failures. It is hardly surprising that this Court has not directed us to examine failed petitioning efforts; it has instead exhorted us to examine successful efforts. *See Storer v. Brown*, 415 U.S. 724, 738, 742 (1974); *Mandel v. Bradley*, 432 U.S. 173, 177-78 (1977); *Crawford v. Marion County Election Board*, 553 U.S. ___, 128 S.Ct. 1610, 1624-25 (2008) (Scalia, J. concurring in the judgment, joined by Thomas and Alito, JJ.). The Eleventh Circuit grounded its decision on Coffield's failure to allege information which does not exist and cannot be obtained.

Second, neither this Court in *Jenness* nor the Eleventh Circuit in *Cartwright v. Barnes, supra*, were presented with information about how many candidates have actually succeeded in meeting the 5% requirement. In *Storer v. Brown*, *supra* at 738, 742, decided three years after *Jenness*, this Court emphasized the importance of considering such information in determining whether a signature requirement is unconstitutionally burdensome:

> . . . [California's 5% petition requirement], as such, does not appear to be excessive, see Jenness v. Fortson, supra, but to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts which do not appear from the evidentiary record in this case.
>
> * * *

> [O]nce [such critical facts are ascertained], there will arise the inevitable question for judgment: *. . . could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.* We note here that the State mentions only one instance of an independent candidate's qualifying for any office under [the statute in question], but disclaims having made any comprehensive survey of the official records that would perhaps reveal the truth of the matter.

(Emphasis added).

Unlike the parties in *Jenness*, *Cartwright v. Barnes* and *Storer v. Brown*, the petitioners made a comprehensive survey of the historical record. It demonstrates that Georgia's 5% requirement *does* "operate to freeze the political status quo," *Jenness* at 438. Independent candidates for the United States House of Representatives have not qualified for the ballot in Georgia with any regularity and will only rarely, if ever, satisfy the 5% signature requirement and succeed in accessing the ballot.

Third, while it is true that the pertinent laws have not changed materially since *Jenness* and *Cartwright* were decided, what has changed is the availability of historical information about the frequency

with which independent and minor party congressional candidates have met the 5% requirement. This information is summarized above and was presented to the lower courts. Such information had apparently never before been proffered to those courts. In declining to consider it, the lower courts disregarded this Court's admonishment in *Storer v. Brown*, *supra*, that "it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not."

This Court has described a reviewing court's task in evaluating a constitutional challenge to a state-imposed restriction on access to the ballot as follows:

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged [restriction] is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

The injury caused by Georgia's 5% requirement is clear, and severe, viz, almost-certain foreclosure from access to the ballot. The state interests advanced by

respondent in justification were: "requir[ing] a preliminary showing of a 'significant modicum of support' before a candidate or party may appear on the ballot," Brief of Appellee at 5; "regulating [the state's] election process," *id.* at 8; "maintaining fairness, honesty, and order," *id.*; "minimizing frivolous candidacies," *id*; and "'avoiding confusion, deception, and even frustration of the democratic process,'" *id.* Left unanswered was the question of how any of these wholly legitimate state interests are served by a signature requirement that candidates are unable to meet. Under *Anderson v. Celebrezze*, *supra*, and its progeny, the courts below were required not only to determine the legitimacy and strength of the interests asserted by the state to justify its ballot access restrictions, but also to "consider the extent to which those interests make it necessary to burden the plaintiff's rights."

The courts below asserted that the present case is foreclosed by *Jenness*. Yet the Eleventh Circuit itself has recognized that "the . . . cases which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*." *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985). In that case the Eleventh Circuit noted that in *Mandel v. Bradley*, *supra*, "the [Supreme] Court reviewed a three-judge court's decision that prior precedents . . . rendered unconstitutional *per se*

provisions of the Maryland election laws. . . ." and that "[t]he Supreme Court reversed, instructing the district court to take evidence and apply constitutional standards announced by the Court in earlier cases." *Id.* at 1555. The Eleventh Circuit then noted that in "weigh[ing] the precise interests advanced by the State as justifications for the burdens imposed by its rules," the district court "may analyze the past experience of minor party and independent candidates in Georgia as an indication of the burden imposed on those who seek ballot access," *id.*, citing *Mandel v. Bradley, supra*, at 178.

In the present case, neither of the courts below undertook any such analysis. Neither court seriously engaged the petitioners' demonstration that candidates have not succeeded in meeting Georgia's 5% signature requirement. Petitioners argue (and have shown) that Georgia law has long had a profoundly restrictive impact, of which the courts apparently have not been aware because they have never before been presented with the information that the petitioners in this case have provided. Petitioners urge that in light of the historical and comparative data they have adduced, Georgia's 5% requirement cannot survive any standard of review on the continuum from rational basis analysis to strict scrutiny. They submit that the 5% requirement effectively precludes independent candidates from running for the United States House of Representatives, thereby unnecessarily burdening the availability of political opportunity to

such candidates and to the electorate. For that reason, the 5% requirement is unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-13277

D. C. Docket No. 08-02755-CV-RLV-1

FAYE COFFIELD,
JASON CROWDER,
BEATRICE WILLIAMS,

Plaintiffs-Appellants,

versus

BRIAN KEMP,
in his official capacity as Georgia
Secretary of State and Chairperson of
the Georgia State Election Board,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(March 19, 2010)

Before EDMONDSON and MARCUS, Circuit Judges, and BARBOUR,* District Judge.

PER CURIAM:

Appellant-Plaintiff Coffield sought access to the 2008 general election ballot as an independent candidate to represent Georgia's Fourth Congressional District in the United States House of Representatives. She was not on the ballot. Briefly stated, she was unable to collect a sufficient number of signatures to satisfy Georgia's requirement that an independent candidate submit a nomination petition signed by at least 5% of the total number of registered voters eligible to vote in the last election for the position the candidate seeks. GA. CODE ANN. § 21-2-170. This appeal presents one issue: whether the district court erred when it dismissed Coffield's constitutional challenge for failure to state a claim under Rule 12(b)(6). We conclude it did not.

Coffield claims that Georgia's 5% rule is too burdensome; she alleges no independent candidate for the House of Representations in Georgia has met the requirement since 1964 and that no minor party candidate has ever met it. But she does not allege how many candidates have tried. According to the Complaint, Coffield's own petitioning effort resulted in about 2000 signatures, less than 1% of the eligible

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* Honorable William Henry Barbour, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.

pool and about 13,000 signatures short of what the rule required.

Our Court and the Supreme Court have upheld Georgia's 5% rule before. *See Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 1974-76 (1971) (stressing lack of restrictions on write-in candidates and on the obtaining of signatures for nominating petitions); *Cartwright v. Barnes*, 304 F.3d 1138, 1140-42 (11th Cir. 2002); *see also Swanson v. Worley*, 490 F.3d 894, 910 (11th Cir. 2007) (upholding Alabama's 3% requirement where no independent or minor party candidate had obtained ballot access when nothing indicated that similar potential candidates had sought ballot access). The pertinent laws of Georgia have not changed materially since the decisions in *Jenness* and *Cartwright* were made.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 09-13277

District Court Docket No.
08-02755-CV-RLV-1

FAYE COFFIELD,
JASON CROWDER,
BEATRICE WILLIAMS,

Plaintiffs-Appellants,

versus

KAREN C. HANDEL,
in her official capacity as Georgia
Secretary of State and Chairperson of
the Georgia State Election Board,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

(Filed Mar. 19, 2010)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: March 19, 2010
For the Court: John Ley, Clerk
By: Gilman, Nancy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FAYE COFFIELD, JASON CROWDER, and BEATRICE WILLIAMS, Plaintiffs,	CIVIL ACTION
v.	NO. 1:08-CV-2755-RLV
KAREN C. HANDEL, in her official capacity as Georgia Secretary of State and Chairperson of the Georgia State Election Board, Defendant.	

ORDER

(Filed May 26, 2009)

This is an action for declaratory judgment and injunctive relief wherein the plaintiffs challenge the constitutionality of O.C.G.A. § 21-2-170(b), which requires that an independent candidate for a congressional seat submit a petition containing the signatures of at least five percent of the total number of registered voters in the previous election in order to be included on the ballot. Pending before the court are the defendant's motion to dismiss [Doc. No. 3] and the plaintiffs' motion for summary judgment [Doc. No. 14].

The plaintiffs' case is foreclosed by Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970 (1971), in which the Supreme Court specifically upheld the five percent requirement of this code section. More recently, the Court of Appeals for the Eleventh Circuit upheld this identical provision in Cartwright v. Barnes, 304 F.3d 1138 (11th Cir. 2002). See also Swanson v. Worley, 490 F.3d 894 (11th Cir. 2007) (upholding Alabama's three percent requirement and citing *Jenness* and *Cartwright*).

In Swanson, the Eleventh Circuit noted that it had rejected a strict scrutiny analysis in determining the constitutionality of a percentage signature requirement. In their complaint, the plaintiffs suggest that the Supreme Court has now mandated a strict scrutiny analysis in such cases, citing language used by Justice Scalia in Crawford v. Marion County Election Board, 553 U.S. ___ 128 S.Ct. 1610 (2008). That case dealt with Indiana's voter ID law, and the Supreme Court upheld that law but did so without a majority opinion. Justice Scalia's language, relied upon by the plaintiffs in this case, was in a concurring opinion, joined only by Justices Thomas and Alito. This court concludes that Justice Scalia's concurring language does not provide a sufficient basis for the court to ignore the holdings of both *Jenness* and *Crawford*.

For the foregoing reasons the defendant's motion to dismiss [Doc. No. 3] is GRANTED; the plaintiffs' motion for summary judgment [Doc. No. 14] is DISMISSED as moot.

SO ORDERED, this 26th day of May, 2009.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-13277-II

FAYE COFFIELD,
JASON CROWDER,
BEATRICE WILLIAMS,

Plaintiffs-Appellants,

versus

BRIAN KEMP,
in his official capacity as Georgia
Secretary of State and Chairperson of
the Georgia State Election Board,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Aug. 4, 2010)

Before: EDMONDSON and MARCUS, Circuit Judges, and BARBOUR,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

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* Honorable William Henry Barbour, Jr., United States District Court for the Southern District of Mississippi, sitting by designation.